PAUL RAJ SAMY RAJ

v.

ANNAMALAR ANTHONYSAMY

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO: 24-79-2003]
19 MAY 2003

CIVIL PROCEDURE: *Discontinuance - Failure to obtain leave of court - Whether discontinuance effective - Rules of the High Court 1980, O. 21 r. 3*

The applicant filed an originating summons seeking access to see his son who was staying with his estranged wife, *ie*, the respondent, at her father's house. The applicant subsequently filed a supporting affidavit for custody, care and control. However, on the same day, the applicant filed a notice of discontinuance of his originating summons with liberty to reinstate his suit. The respondent applied to this court to set aside the said notice with costs.

Held:

[1] The applicant had failed to give any reasonable explanation for withdrawing the action and this would suggest that it was not made *bona fide*, especially when the respondent was also in *dominus litis* as she was able to demonstrate that she had a response to the applicant's allegations. Having brought the respondent to court and wherein the proceedings had reached its final stage, the applicant could not arbitrarily avoid the contest by seeking to discontinue the action without even giving the respondent the right to seek for costs pursuant to O. 21 r. 5 (1) of the Rules of the High Court 1980. Once a matter is *pendente lite*, a plaintiff or an applicant must not be allowed to abuse the court process by disposing of the case as he thinks fits. (p 171 d-f)

[Applicant's notice of discontinuance set aside with costs.]

Case(s) referred to:
Gomez v. Gomez [1969] 1 MLJ 229 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 21 rr. 3(1), 5(1), O. 38 r. 2(3)

For the applicant - Sanisvara Nethaji Rayer (K Lekhalekshimi & Raveentharan); M/s R Nethaji Rayer & Co
For the respondent - Athimulan Muruthiah; M/s Athimulan & Co

Reported by M Maheswaran

JUDGMENT

RK Nathan J:

Facts
The applicant filed this originating summons and prayed for the following orders:

a) that he be given access to see his son AAR aged one year and ten months every day between six to seven in the evening for one month from the date of hearing (such access to be at his father-in-law's residence at No. 68, Lorong Riang, Taman Riang, 12300 Butterworth);

b) free, liberal and reasonable access everyday;

c) costs in the cause;

d) any other order that this court deems fit and proper.

In support of the application the applicant, a chambering law student affirmed an affidavit in which he contended amongst others that he had been deprived of the opportunity to see his son by the wanton conduct of his father-in-law for the last ten months. This application was filed with a certificate of urgency.

Findings Of The Court
Because of the certificate of urgency, I fixed the application for hearing on 30 January 2003. On that day counsel for the respondent sought an adjournment as she requested for time to file a reply. However on an appeal by Mr. R.N. Raja for the applicant that his client was pining to see his son I granted an interim order that the applicant be allowed to see his son that evening itself between six to eight at the applicant's father-in-law's residence. Shortly after I had made that order both counsel re-appeared in chambers and by consent applied to vary my order in terms to read as follows:

1) Access only from six to seven in the evening;

2) At the neighbour's house No. 66 and not at the applicant's father-in-law's house.

I amended my order accordingly and fixed the hearing of the application to 19 February 2003.

On 19 February 2003 Mr. Rayer who had taken over the conduct of the matter from Mr. Raja informed the court that he was applying to amend encl. 2 and that the said application had been fixed for hearing before the learned senior assistant registrar (SAR) incidentally also on the same day. Mr. Athimulan for the respondent informed the court that he needed to reply to the affidavit in support of the application to amend. I then fixed the hearing of encl. 2 to 26 May 2003 since both parties needed time to reply. In the meantime the respondent filed her affidavit in reply on 13 February 2003. She annexed to her affidavit, an affidavit filed by her father and marked it AM1. I am surprised at this mode of tendering evidence. The respondent's father himself could have filed an affidavit in support of his daughter's affidavit rather than having his affidavit used as an exhibit. If the intention was to avoid being cross-examined on the basis of O. 38 r. 2(3) of the Rules of the High Court 1980 (the RHC) which seems to allow the court to direct "the attendance for cross-examination of the person making any such affidavit", and makes no reference to a person who is the maker of an exhibit annexed to an affidavit, the case of *Gomez v. Gomez* [1969] 1 MLJ 229 (in which case I appeared for the applicant and which case was also my first appearance after my call) put an end to this myth. In *Gomez v. Gomez* the applicant the father had applied to vary a custody order. During the divorce proceedings he had agreed to grant custody of their only female child to the wife since the wife a Hindu had converted to Catholicism. But after the divorce it was alleged she was intending to marry a Hindu and Gomez wanted custody. However a Rev. Father J Wood gave a letter which the wife annexed to her affidavit in which it was stated that the wife was indeed following the Catholic faith. The applicant thus sought leave to cross-examine the Rev. Father who gave the letter. Azlan Shah J (as his Highness then was) in a short but erudite judgment decided that O. 38 r. 2(3) of the RHC must be interpreted to also include the makers of the exhibits who could be subjected to cross-examination.

In her affidavit the respondent made various unsavory allegations against the applicant. Amongst others she accused the applicant of going against her advice and entering into wrong investments so much so that even the sum of RM16,000 she gave him was spent. She accused the applicant of emotional outbursts.

The supporting affidavit of the respondent's father contained many more allegations.

In an affidavit (exh. 15) filed in support of his earlier affidavit, the applicant now sought an order for custody, care and control. This was without filing any application to amend. Seeing that the applicant had been ill-advised to file only an affidavit seeking custody care and control of the infant thus deviating broadly from an earlier application which was to seek access, this court indicated to counsel for the applicant that he ought to consider either amending the application or withdrawing the application and re-filing, seeking custody care and control.

The applicant failed to disclose to this court that the application before the learned SAR was an application to amend, to seek for custody care and control of the infant. However on the same day ie, on 19 February 2003 the applicant filed a notice of discontinuance of the said originating summons. This is the respondent's application (encl. 13) to set aside the notice of discontinuance with costs. It is necessary for the purposes of considering this application to reproduce the said notice of discontinuance. It reads as follows:

DALAM MAHKAMAH TINGGI DI PULAU PINANG
DALAM NEGERI PULAU PINANG, MALAYSIA
SAMAN NO: 24-79-2003 (M.T.4)

DI DALAM PERKARA DI BAWAH AKTA PEMBAHARUAN PERKAHWINAN DAN PENCERAIAN, 1976

DAN

DI DALAM PERKARA DI BAWAH KAEDAH PROSIDING PENCERAIAN DAN PENYENGGARAAN 1980

DAN

DI DALAM PERKARA DI BAWAH AKTA PENJAGAAN KANAK-KANAK, 1961

DAN

DI DALAM PERKARA DI BAWAH KAEDAH-KAEDAH MAHKAMAH TINGGI 1980

ANTARA

PAUL RAJ A/L SAMY RAJ ... PEMOHON

DAN

ANNAMALAR A/P ANTHONYSAMY ... RESPONDEN

NOTIS PEMBERHENTIAN

Ambil perhatian bahawa Pemohon di atas secara keseluruhan menarik balik tindakan ini terhadap Responden dengan kebebasan untuk memfailkan semula tindakan ini.

Bertarikh pada 19 haribulan Februari, 2003.

Sgd
...
Peguamcara bagi pihak Pemohon

Notis Pemberhentian ini difailkan oleh Tetuan R. NETHAJI RAYER & CO., Peguambela & Peguamcara yang beralamat di N. 20-E (Tingkat Atas), Lebuh Penang, 10200 Pulau Pinang.

It must be noted that the notice of discontinuance does not comply with O. 21 r. 3(1) and (2) of the RHC which read as follows:

Discontinuance of action, etc with leave (O. 21 r. 3)

(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule may be made by summons.

Not only did the applicant fail to obtain the leave of the court to discontinue, he also arbitrarily and without an order of the court, granted to himself leave to re-file the action. The applicant has also failed to comply with Form 36 which is the approved form to discontinue an action. It reads as follows:

No. 36
NOTICE OF DISCONTINUANCE
(Title as in action)

Take notice that the plaintiff wholly (or specify the part) discontinues this action (or the defendant wholly (or specify the part) withdraws the defence or discontinues his counterclaim) against the defendant (plaintiff).

Dated the ... day of ..., 19 ...

...
Solicitor for the ...

To the Registrar and the other parties to the action.

The applicant had no authority to state 'dengan kebebasan' in the notice of discontinuance. Once the applicant applies under sub-r. (2) by summons for leave to discontinue (or by consent of the respondent pursuant to sub-r. (4)) and when an order is given by the court, the applicant must then proceed to extract that order of the court. The entire procedure adopted by the applicant is wrong and is untenable. Having discontinued this action in this court the applicant filed a fresh originating summons in court 3 in terms identical to his application to amend before this court.

Since the applicant had already filed an application to amend the originating summons and which said application was set to be heard before the learned SAR and wherein the application to amend was in identical terms as the fresh application filed in court 3, the applicant has failed to give any or any reasonable explanation for withdrawing this action and re-filing and thus incurring unnecessary costs. In the absence of any explanation in the supporting affidavit, the filing of the notice of discontinuance especially when the respondent had filed copious affidavits and had made serious allegations against the applicant, would suggest that the discontinuance was not made *bona fide* especially when the respondent was also in *dominus litis* because of her ability to demonstrate that she had a response to the applicant's allegations. Having brought the respondent to court and wherein the proceedings have reached the final stage since this court had set the date for hearing as 26 May 2003, the applicant cannot arbitrarily avoid the contest by seeking to discontinue the action without even giving the respondent the right to seek for costs pursuant to O. 21 r. 5(1) of the RHC. Once a matter is *pendente lite*, a plaintiff or an applicant must not be allowed to abuse the process of the court by disposing of the case as he thinks fit.

Having considered all matters germane to this application it is my judgment that the notice of discontinue dated 19 February 2003 filed by the applicant be set aside with costs to the respondent. The matter is *cadit quaestio*; it admits of no further argument.